Tan Kim Hor & Ors v Tan Heng Chew & Ors

HIGH COURT (KUALA LUMPUR) — COMPANIES WINDING-UP NO D3(D2)-28-507 OF 2001
ZULKEFLI J
14 JUNE 2004

Civil Procedure — Pleadings — Amendment of — Amendment of winding-up petition — Whether court may give leave to amend petition under O 20 r 5 read in conjunction with O 20 r 7 of Rules of the High Court 1980

Companies and Corporations — Winding up — Petition — Amendment — Whether any injustice to other side — Whether amendments bona fide — Whether prejudice to other side can be compensated by costs — Whether amendments would turn suit of one character into suit of another and inconsistent character — Companies Act 1965 s 221(2)(e)

This winding up petition ('this petition') was filed in court on 21 May 2001. Upon the application of the petitioners, the court granted leave for the petitioners to make minor amendments to this petition. Subsequently, on the application of the respondents, the High Court struck out this petition. The petitioners then appealed to the Court of Appeal. On 29 January 2003, the Court of Appeal allowed the petitioners' appeal and set aside the High Court striking-out order. The respondents sought leave to appeal to the Federal Court. The Federal Court dismissed the respondents' leave application.

This was the petitioners' application to seek leave of court to re-amend this petition pursuant to s 221(2)(e) of the Companies Act 1965 ('the Act') and/or under O 20 r 5 of the Rules of High Court 1980 ('RHC') and/or under the inherent jurisdiction of the court on the grounds that there had been significant events that had occurred between the parties subsequent to the filing of the petition. The significant amendments can be categorised as follows: (a) marginalisation and exclusion of the petitioners from management and participation in the Tan Chong groups of companies; (b) disregarding or endangering the distributorship of Nissan Motor Ltd and Shiseido Ltd; and (c) the ouster of the petitioners from key positions in Tan Chong Consolidated Sdn Bhd and the Tan Chong groups of companies. The respondents objected to this application on the grounds, inter alia, that the amendments were substantially the same as the 'new events' contended by the petitioners in the second petition filed by the petitioners, which was struck out on 20 May 2003 by this court.

Held, allowing the application:

(1) The respondents' objections on the grounds that the amendments were substantially the same as the 'new events' in the second petition filed by the petitioners were without merit. The striking out of the second petition by this court must be read in the proper context and cannot be used as a general bar to the petitioners raising the new events in this petition. In striking out the said second petition, this court had, inter alia, stated that even if the petitioners were right in claiming that there were new grounds of facts, this cannot justify the filing of the second petition as the petitioners were still in a position to

raise these facts or add as new grounds in evidence at the trial of this petition. The said new events had not been determined on their merits by this court and hence the principles of res judicata and/or issue estoppel did not apply (see paras 5, 6 and 7).

(2) Section 221(2)(e) of the Act allowed the petitioners to make the amendments to this petition. Although O 20 r 5 of the RHC appeared to apply primarily to pleadings, this provision, read in conjunction with O 20 r 7 of the RHC, can be extended such that a court may give leave to amend a petition (see paras 8, 9 and 10); *Chaw Anui v Tan Kim Chai* [20021] 1 AMR 39 followed.

(3) The general principle was that the court would allow such amendments as will cause no injustice to the other side. Based on the facts and the circumstances of this case, the petitioners had shown that: (a) the amendments were bona fide; (b) the amendments caused no prejudice to the respondents which cannot be compensated by costs; and (c) the amendments were not such as to turn a suit of one character into a suit of another and inconsistent character. Further, the amendments were crucial for a proper and fair determination of the disputes between the parties and they would not cause any prejudice to the respondents (see paras 12–15); *Looi Guan Kway v Low Lean Bok* [1938] MLJ 35, *Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 MLJ 213 followed.

[**Bahasa Malaysia summary**

Petisyen penggulungan (petisyen) telah difailkan di mahkamah pada 21 Mei 2001. Setelah menerima permohonan petisyen, pihak mahkamah telah membenarkan pempetisyen membuat pembetulan kecil dalam petisyen tersebut. Pihak responden kemudiannya memohon agar petisyen ini di batalkan, dan permohonan ini dibatalkan oleh Mahkamah Tinggi. Pemetisyen kemudiannya merayu ke Mahkamah Rayuan. Pada 29 Januari 2003, Mahkamah Rayuan membenarkan rayuan pempetisyen dan telah mengetepikan keputusan Mahkamah Tinggi. Responden kemudiannya memohon kebenaran untuk merayu di Mahkamah Persekutuan dan Mahkamah Persekutuan telah menolak rayuan tersebut.

Plaintif memohon agar mahkamah membenarkan permohonan untuk membetulkan petisyennya mengikut s 221(2)(e) Akta Syarikat 1965 (Akta tersebut) atau di bawah A 20 K 5 Kaedah-Kaedah Mahkamah Tinggi (KMT) atas alasan terdapat perkembangan penting yang berlaku di antara masa perbicaraan dan bila petisyen difailkan. Peristiwa penting yang dimaksudkan termasuk; (a) pempetisyen telah dikecualikan dan dimarginisasikan dari menyertai kumpulan syarikat Tan Chong (b) ketidakhirauan dan memperbahayakan dan tidak mempedulikan pengedaran Nissan Motor Ltd and Shiseido Ltd; dan (c) penyingkiran pempetisyen dari tugasan utama. Responden telah membantah permohonan ini atas alasan inter alia bahawa pembetulan yang dibuat adalah sama secara substantif dengan 'perkembangan baru' dalam petisyen kedua yang difailkan oleh pempetisyen yang telah dibatalkan pada 20 Mei 2003.

Diputuskan, membenarkan rayuan tersebut:

(1) Responden membantah atas alasan bahawa pembetulan yang dicadangkan adalah substantif dengan 'perkembangan baru'dalam petisyen yang kedua yang telah ditolak oleh mahkamah kerana petsyen tersebut tiada merit. Dengan membatalkan petisyen kedua tersebut oleh mahkamah mestilah dilihat dalam konteks yang betul dan bukannya digunakan sebagai rintangan umum kepada petisyen yang telah membawa isu perkembangan baru. Pembatalan petisyen yang kedua itu mahkamah secara inter alia telah menyatakan bahawa walaupun pempetisyen betul dalam mendakwa bahawa terdapap perkembangan baru dalam fakta kes tersebut, ini bukanlah sebab untuk menjustifikasikan petisyen yang kedua kerana pempetisyen masih boleh membangkitkan isu ini dan menambah fakta baru sebagai bukti dalam perbicaraan petisyen tersebut. Perkembangan baru tersebut tidak boleh dipastikan meritnya dari mahkamah. Jadi prinsip res judicata atau estopel tidak boleh digunakan (lihat perenggan 5, 6 dan 7).

(2) Seksyen 221(2)(e) Akta tersebut membenarkan pempetisyen membuat pembetulan atas petisyen ini walaupun A 20 K 5 KMT digunakan untuk pliding, proviso ini mesti dilihat bersama dengan A 20 K 7 KMT di mana tugas utamanya adalah untuk membolehkan mahkamah membetulkan petisyen tersebut (lihat perenggan 8, 9 dan 10); *Chaw Anui v Tan Kim Chai* [2002] 1 AMR 39 diikut.

(3) Prinsip utama adalah bahawa mahkamah boleh membenarkan pembetulan tersebut dan tidak menyebabkan ketidakadilan ke pihak yang lain. Merujuk kepada fakta yang diberikan pempetisyen telah menunjukkan bahawa (a) pembetulan yang dibuat adalah bona fide (b) pembetulan yang dibuat tidak mewujudkan apa-apa prejudis terhadap responden dan tidak boleh dipampas dengan kos dan (c) pembetulan yang dibuat tidak boleh menukarkan satu personaliti ke personaliti yang lain. Tambahan pula pembetulan yang dibuat adalah amat penting untuk memastikan pertikaian antara pihak diselesaikan dengan adil dan tidak menyebabkan kewujudan apa-apa prejudis terhadap responden (lihat perenggan 12–15); *Looi Guan Kway v Low Lean Bok* [1938] MLJ 35, *Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 MLJ 213 diikut.]

Notes

For cases on amendment of pleadings, see 2(3) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 4396-4423.

For cases on winding up of petitions, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1152-1219.

Cases referred to

Chaw Anui v Tan Kim Chai [2002] 1 AMR 39 (folld)

Looi Guan Kway v Low Lean Bok [1938] MLJ 35 (folld)

Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors [1983] 1 MLJ 213 (folld)

Legislation referred to

Companies Act 1965 s 221(2)(e)
Rules of the High Court 1980 O 20 r 5, O 20 r 7

Cecil Abraham (K Yee with him) (Shearn Delamore & Co); Shafee (Azhar Azizan with him) (Shafee & Co) for the petitioners
Lim Kian Leong (SS Sia with him) (Lim Kian Leong & Co) for the respondents

Zulkefli J:

[1] This is an application by the petitioners to seek leave of this Court to re-amend the petition pursuant to s 221(2)(e) of the Companies Act 1965 ('the Act') and/or under O 20 r 5 of the Rules of High Court 1980 ('RHC 1980') and/or under the inherent jurisdiction of the Court. (Enclosure 93).

[2] The following are some relevant background facts of the case:

(1) The petition was filed in Court on 21 May 2001 as Companies Winding-up Petition No D2-28-507-2001 and the first hearing date was fixed on 16 August 2001.

(2) On 18 July 2001, upon the application of the petitioners, the Court granted leave for the petitioners to make minor amendments to the petition. The two amendments made were to insert s 218(1)(i) of the Act and to substitute the name of the liquidator.

(3) On 9 October 2001, upon the application of the respondents, Her Ladyship Madam Justice Zainun Bte Ali struck out this petition.

(4) The petitioners subsequently appealed to the Court of Appeal. On 29 January 2003, the Court of Appeal allowed the petitioners' appeal and set aside the High Court striking out order. The Court of Appeal further ordered that this petition be remitted to the High Court for trial before another Judge. Hence, the hearing of this petition before this Court as Companies Winding-up Petition No D3(D2)-28-507-2001.

(5) The respondents then sought leave to appeal to the Federal Court on 25 February 2003. The Federal Court subsequently dismissed the respondents' leave application on 29 October 2003 vide Federal Court Application No 08-13-2003 (W).

Petitioners' Contention and the Proposed Amendments

[3] The petitioners contended that there have been significant events that have occurred between the parties subsequent to the filing of the petition, which could not be included in the initial petition. Hence this Notice of Motion was filed by the petitioners on 19 January 2004 before this Court to re-amend the petition. The proposed amendments are contained in Annexure A of the Notice of Motion and the precise details are set out in paragraph 166 to paragraph 234. The significant amendments can be categorised as follows:

(i) The marginalisation and exclusion of the petitioners from management and participation in the Tan Chong Groups of Companies (Annexure A – paragraphs 168–176 at pp 46–48);

(ii) Disregarding or endangering the distributorship (franchise) of Nissan Motor Ltd and Shiseido Ltd (Annexure A – paragraphs 177–190 at pp 49–53); and

(iii) The ouster of the petitioners from key positions in Tan Chong Consolidated Sdn Bhd ('TCC') and in the Tan Chong Groups of Companies (Annexure A – paragraphs 191–200 at pp 53-57).

The Respondents' Objections

[4] The respondents' objections basically are as follows:

(i) The amendments are substantially the same as the 'new events' contended by the petitioners in the second petition filed by the petitioners which was struck out on 20 May 2003 by this Court.

(ii) The 'new events' are irrelevant to a winding up petition against TCC and, in any event, the allegations do not give rise to any right of a shareholder of TCC to assert a breach of any legitimate expectation; and

(iii) The principle of 'Res Judicata' and/or 'Issue Estoppel' would apply to the proposed amendments since they are substantially the same as the 'new events' contained in the second petition which have been struck out and, as such, this application amounts to an abuse of process.

Decision of the Court

[5] I am of the view that the respondents' objections on the ground that the amendments are substantially the same as the 'new events' in the second petition filed by the petitioners are without merit. The striking out of the second petition by me then must be read in the proper context and cannot be used as a general bar to the petitioners raising the new events in this petition.

[6] It must be read in the context of this family winding-up petition by the quasi-partners. In my decision in striking out the said second petition filed by the petitioners then, I had inter alia stated that even if the petitioners are right in claiming that there are new grounds of facts, this cannot justify the filing of the second petition as the petitioners are still in a position to raise these facts or add them as new grounds in evidence at the trial of the first petition. It would be wrong and inequitable for the respondents to seek to bar the petitioners from raising new events which may be caused by them. The merits or veracity of these new events are matters to be dealt with in the later course of these proceedings where the respondents are given their opportunity to reply.

[7] In my view these new events have not been determined on their merits by this Court. Hence the principles of 'Res Judicata' and/or 'Issue Estoppel' raised by the respondents do not apply. There is no abuse of process on the

part of the petitioners. It is the petitioners' legitimate right to include new events into this petition so as to table all the relevant facts before the Court. Furthermore, these amendments contain purely descriptions of factual events, which may be caused by the actions of the respondents.

[8] As regards the law, I find that the provision of s 221(2)(e) of the Act allows the petitioners to make such amendments to the petition filed. Section 221(2)(e) of the Act provides as follows:

> (2) The Court may on the petition coming on for hearing or at any time on the application of the petitioner, the company, or any person who has given notice that he intends to appear on the hearing of the petition -
>
> (e) allow the petition to be amended or withdrawn;

[9] I am also of the view that O 20 r 5 of the RHC 1980 and the inherent jurisdiction of this Court may be invoked and are applicable to the proposed amendment made by the petitioners. Order 20 r 7 of the RHC 1980 reads as follows:

> Rule 5 shall have effect in relation to an originating summons, a petition and an originating notice of motion as it has effect in relation to a writ.

[10] Although at first glance, O 20 r 5 of the RHC 1980 appears to apply primarily to pleadings, and as such a petition would not fall within the scope of the said provision, I am of the view that this provision can be extended such that a court may give leave to amend a petition. I find support for such a contention in the light of the decision in *Chaw Anui v Tan Kim Chai* [20021 1 AMR 39 wherein his lordship, Low Hop Bing J at p 44 had this to say:

> The procedure governing the amendment of a writ or pleading is contained in Order 20 r 5(1) of the Rules of the High Court 1980 which reads:
>
> '5. (1) Subject to Order 15 rules 6, 7 and 8 and the following provisions of this rule, the Court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleadings, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.'
>
> The word 'pleading' used in Order 20 r 5(1) of the Rules of the High Court 1980 has, by virtue of Order 20 r 7 been extended to include eg a petition so that Order 20 r 5 shall have effect in relation to a petition also.

[11] Therefore, with regard to amendments to a petition, it is evident that O 20 r 5 read in conjunction with O 20 r 7 of the RHC 1980 would allow such amendments to be made by the petitioners as in the present case.

[12] The general principles guiding the court in granting amendments are well settled by case law wherein the court would allow such amendments as will cause no injustice to the other side. In order to determine whether an injustice will result, certain other principles will have to be considered. In *Looi Guan Kway v Low Lean Bok* [1938] MLJ 35 upon an application by the plaintiff to amend the pleadings, his lordship Atiken J enunciated three principles for the guidance of the court, namely:

(i) there is bona fides on the part of the applicant;

(ii) the amendments cause no prejudice to the other side which cannot be compensated by costs; and

(iii) they are not such as to turn a suit of one character into a suit of another and inconsistent character.

[13] In *Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 MLJ 213, the Federal Court in the judgment of Mohamed Azmi FCJ at pp 214–215 inter alia had this to say:

> Under Order 20 of the Rules of the High Court 1980, which is equivalent to Order 28 Rules of the Supreme Court, a Judge has a discretion to allow leave to amend pleadings. Like any other discretion, it must be of course be exercised judicially (see *Kam Hoy Tradine v Kam Fatt Tin Mine*). The general principle is that the court will allow such amendments as will cause no injustice to the other parties. Three basic questions should be considered to determine whether injustice would or would not result, (1) whether the application is bona fide; (2) whether the prejudice caused to the other side can be compensated by costs; and (3) whether the amendments would not in effect turn the suit from one character into a suit of another and inconsistent character ... If the answers are in the affirmative, an application for amendment should be allowed at any stage of the proceedings particularly before trial, even if the effect of the amendment would be to add or substitute a new cause of action, provided the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the original statement of claim.

[14] Based on the facts and the circumstances of this case, it is my finding that the petitioners in making this application to re-amend the petition have shown the following:

(i) that the amendments are bona fide;

(ii) that the amendments cause no prejudice to the respondents which cannot be compensated by costs; and

(iii) that the amendments are not such as to turn a suit of one character into a suit of another and inconsistent character.

[15] It is also my view that these amendments are crucial for a proper and fair determination of the disputes between the parties and they certainly cause no prejudice to the respondents. The respondents are at liberty to reply to address these issues and there is really no reason for any objection to the amendments.

[16] For the above stated reasons I hereby allow the petitioners' application (Enclosure 93) with an order that the respondents are to be compensated with costs by the petitioners for this proceeding.

Petitioner's application allowed.

Reported by Lim Lee Na